TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THIS WRIT

I Petitioner's claim that his privilege against self-incrimination under Garrity v. New Jersey was violated does not present a substantial Federal question 4

II Petitioner's claim that he was entitled to Miranda warnings when he was not in custody does not present a substantial Federal question 6

III The comments of the prosecutor during petitioner's trial which were prejudicial to petitioner were forcefully stricken by the trial court and are ordinary evidentiary matters not involving a substantial Federal question 9

CONCLUSION 11

CASES CITED

Beal v. United States, 340 U.S. 852 (1950) 6
Bruton v. United States, 391 U.S. 123 (1968) 10
Community Services, Inc. v. United States,
342 U.S. 932 (1952) 6
Garrity v. New Jersey, 385 N.J. 493 (1966) 4,5,6
Mathis v. United States, 391 U.S. 1 (1968) 7
Miranda v. Arizona, 384 U.S. 436 (1966) 6,7,8
Orozco v. Texas, 394 U.S. 324 (1969) 7
Spevak v. Klein, 385 U.S. 511 (1966) 5
State v. Falco, 114 N.J. Super. 53, 55-56, 274
A.2d 828 (App. Div. 1971) 5
State v. Stillwell, 97 N.J. Super. 424, 425-427,
235 A.2d 229 (App. Div. 1967) 5
United States v. Abrams, 344 U.S. 855 (1952) 6
United States v. Johnston, 268 U.S. 220, 227 (1925) 11

NEW JERSEY STATUTES CITED

N.J.S.A. 2A:81–17.1 4,6
N.J.S.A. 2A:81–17.2a et seq. 6
N.J.S.A. 2A:98–1 2
N.J.S.A. 33:1–31.2 2

NEW JERSEY RULE OF EVIDENCE CITED

Rule 63(10) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-513

ANGELO DE ROSA,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether the admission of an admittedly voluntary sworn statement by a defendant violates his privilege against self-incrimination as interpreted in *Garrity v. New Jersey* because of the mere existence of a forfeiture-of-office statute.

2. Whether admission of an admittedly voluntary statement given by petitioner prior to receiving *Miranda* warnings when Petitioner was not in custody violated his Fifth Amendment right against self-incrimination.

3. Whether references by the prosecutor at trial to the various illegal activities of petitioner's co-defendant and certain evidential rulings by the trial court resulted in such prejudice to petitioner as to deny him due process of law under the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review a judgment entered in the New Jersey Superior Court, Appellate Division, on March 16, 1972, affirming petitioner's conviction by the Bergen County Court, Law Division, for conspiracy to obstruct justice and the due administration of the laws of New Jersey in violation of *N.J.S.A.* 2A:98–1. The unreported *per curiam* opinion of the Appellate Division is included in petitioner's appendix. On June 30, 1972, the New Jersey Supreme Court dismissed petitioner's appeal for failure to present a substantial constitutional question.

Petitioner's conviction arose out of testimony he gave before the New Jersey Division of Alcoholic Beverage Control in Newark, on January 7, 1970, in support of an application by one Vincent Sollazzo to remove a disqualification from the right to possess a liquor license pursuant to *N.J.S.A.* 33:1–31.2. Because of a 1947 bookmaking conviction in New York, the Division of Alcoholic Beverage Control required that Sollazzo present three witnesses to testify on his behalf to prove that he had conducted himself in a law-abiding manner for the last five years and that his association with the alcoholic beverage industry would not be contrary to the public interest.

At the hearing, petitioner De Rosa testified that he had been the police chief of South Hackensack, New Jersey, for 30 years, that he knew Sollazzo over ten years and that in the past five years he had seen Sollazzo on an average of once a week. In addition, he gave the following specific testimony:

> "Q. Do you know his reputation in the community?
>
> A. Yes
>
> Q. Have you in the past five years heard anyone speak of him in a derogatory manner?
>
> A. No.
>
> Q. In your opinion, is he an honest, law-abiding person with a good reputation?
>
> A. Yes.
>
> Q. Do you feel that you had an ample opportunity to observe Mr. Sollazzo in order to make the statement you have made concerning his character?
>
> A. Yes."

Sollazzo testified that he was a half partner in the Jade East Motel in South Hackensack, that he worked at the motel as a clerk and manager and that he had been fined $400 on a conviction for bookmaking in Manhattan, New York City, on July 19, 1947.

On March 19, 1970, petitioner was asked to come to the Office of the County Prosecutor of Bergen County, New Jersey. No subpoena had been issued requiring his attendance. Upon his arrival, De Rosa was told that the prosecutor was investigating the South Hackensack Police Department and the Jade East Motel. The prosecutor's office had some suspicion of corruption in the police department in South Hackensack. Petitioner was asked if he was willing to give a sworn statement. He indicated he was completely willing to give a sworn statement and proceeded to give the statement. After the statement was given, petitioner left the prosecutor's office. No attempts were made to place him in custody.

The trial court ruled there was absolutely no evidence that petitioner feared he would lose his job if he did not go to the prosecutor's office or give a statement. The court found that De Rosa appeared voluntarily at the courthouse, that he was not in custody and that he was willing to give a voluntary statement. In addition, the court found petitioner was not entitled to the *Miranda* warnings because he was not in custody and not the focus or target of the investigation. The court specifically stated it did not rest its decision on the fact that defendant was a police officer.

De Rosa's statement to the prosecutor indicated that on December 19, 1969, about three weeks prior to the Division of Alcoholic Beverage Control hearing, he learned that the Bergen County Prosecutor's Office had conducted a raid at the Jade East Motel in South Hackensack for suspected loansharking activities. De Rosa contacted the Bergen County Prosecutor's Office and was requested to have Sollazzo report to the prosecutor's office. On the afternoon of the raid, or within a few days after the raid, petitioner learned that Sollazzo was the subject of a continuing investigation by the prosecutor's office. About two weeks after the raid, petitioner learned that the investigation of the Jade East Motel involved loansharking. In the statement De Rosa also stated that he believed the raid at

Sollazzo's motel occurred after the hearing before the Division of Alcoholic Beverage Control, for he never would have testified on Sollazzo's behalf if he had known about the raid at the time.

Because petitioner and Sollazzo were tried jointly the trial court deleted the reference to loansharking in petitioner's statement to protect the co-defendant Sollazzo. The court however indicated that if De Rosa testified the whole statement could be introduced in evidence.

Petitioner did take the stand in his own defense at trial. He testified that he had been Chief of Police in South Hackensack for 23 years. He stated that he went to the prosecutor's office freely and willingly, that no promises or threats were made to cause him to give the statement and that he gave the statement voluntarily. He further testified that the statement presented in evidence was an accurate transcription of the statement he gave the prosecutor. Petitioner further testified that he was informed by telephone about the raid on the motel on the afternoon of the raid. He admitted being informed that the county prosecutor's office wanted to see Sollazzo concerning the raid.

Based on the above evidence the jury returned a verdict of guilty.

REASONS FOR DENYING THIS WRIT

I

Petitioner's claim that his privilege against self-incrimination under Garrity v. New Jersey was violated does not present a substantial federal question.

The facts in the present case clearly indicate there is no substantial federal constitutional question concerning the admissibility of defendant's statement. The heart of the decision in *Garrity v. New Jersey*, 385 *N.J.* 493 (1966), was that certain testimony given by police officers was involuntary because they were told they would lose their jobs under *N.J.S.A.* 2A:81–17.1 if they did not testify. Speaking for the court in *Garrity*, Justice Douglas stated:

> "We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions . . . The question is whether the

accused was deprived of his free choice to admit, to deny, or to refuse to answer." *Id.* at 496.

The determination, therefore, which must be made in every case is whether a public employee speaks involuntarily because of fear for the loss of his job. See *Garrity v. New Jersey, supra; Spevak v. Klein,* 385 *U.S.* 511 (1966); *State v. Falco,* 114 *N.J. Super.* 53, 55-56, 274 *A.*2d 828 (App. Div. 1971); *State v. Stillwell,* 97 *N.J. Super.* 424, 425-427, 235 *A.*2d 229 (App. Div. 1967).

The trial court below conducted a hearing on the voluntariness of petitioner's statement. The court indicated after the hearing that there was absolutely no evidence that petitioner feared he would lose his job if he did not give a statement to the representatives of the county prosecutor. The court found that De Rosa's appearance at the courthouse in Hackensack, where the statement was given, was at the request of the prosecutor's office but was not the result of fear he would lose his job if he did not appear. The court also found that the grand jury room was used as a matter of convenience, that petitioner was not in custody, that petitioner was permitted to leave after giving the statement, that petitioner was not the focus of the investigation of the South Hackensack Police Department and that petitioner's appearance and statement were voluntary.

The finding by the trial court that the statement was "voluntary" was later confirmed when petitioner De Rosa himself took the witness stand. De Rosa testified he went to the prosecutor's office "freely" and "willingly." He testified that no promises or threats of any kind were made to cause him to give the statement and that he gave the statement "voluntarily." This testimony flies in the face of petitioner's present claim that by virtue of his position as police chief he must have known of the forfeiture statute and that his statement was somehow a product of its coercive effect. Petitioner's present claim is merely an attempted recantation of his trial testimony to give the appearance of a constitutional argument in this petition for writ of certiorari. Petitioner cannot, however, recant his trial testimony which conclusively showed that petitioner's statement did not result from compulsion as in *Garrity v. New Jersey, supra.*

Petitioner also seems to argue that the very existence of

N.J.S.A. 2A:81–17.1 is coercive and renders his statement inadmissible. In support of this argument, petitioner cites, wholly out of context, isolated excerpts of Justice Harlan's dissenting opinion in *Garrity*. Petitioner ignores the fact that the majority opinion dealt squarely with petitioner's present contention and rejected it, finding the statute to be relevant only for the bearing it has on the issue of voluntariness. *Garrity v. New Jersey, supra*, at 496.

The trial court scrupulously followed the precepts of *Garrity* and found that petitioner's statement was not coerced by a fear of losing his job. This finding was supported by overwhelming evidence, including the testimony of petitioner himself. Petitioner has raised no issues which have not already been decided by the court in *Garrity*. In light of the findings by the trial court and his testimony at trial, it is difficult to comprehend how petitioner can seriously claim that there is a substantial constitutional question concerning the admissibility of his statement.

The statute attacked by petitioner, *N.J.S.A.* 2A:81–17.1, was repealed on May 15, 1970. A new statute relating to the duty of public employees to appear and testify was enacted which differs significantly from the statute in issue here. *N.J.S.A.* 2A:81–17.2a, *et seq.* The statute which replaces the one upon which the present controversy rests forbids the use of information compelled under the statute in a criminal proceeding against the person from whom it is compelled. *N.J.S.A.* 2A:81–17.2A2. Consequently, the issue raised by petitioner in the present case will not arise under the new statute. As a result, certiorari should be denied. See *e.g.*, *United States v. Abrams*, 344 *U.S.* 855 (1952); *Community Services, Inc. v. United States*, 342 *U.S.* 932 (1952); *Beal v. United States*, 340 *U.S.* 852 (1950).

II

Petitioner's claim that he was entitled to Miranda warnings when he was not in custody does not present a substantial federal question.

Petitioner contends that the trial court's action in admitting his statement into evidence was based on an erroneous reading of *Miranda v. Arizona*, 384 *U.S.* 436 (1966). A review

of the record will show that the trial court properly found petitioner was not entitled to the *Miranda* warnings prior to giving his statement.

The trial court found that petitioner was not in custody at the time he gave his statement and that he was not the focus or target of the investigation by the Bergen County Prosecutor's Office. Defendant testified at trial that at the request of the county prosecutor's office he came to the courthouse for a meeting with the county prosecutor "freely" and "willingly." He was not under arrest. After the statement was given he was free to leave, and in fact did leave the courthouse. The grand jury room was selected only as a matter of convenience; no subpoena had been issued to petitioner requiring his presence. There was no allegation of questioning in a threatening or overbearing manner. In the words of *Miranda*, petitioner was not "deprived of his freedom of action in any significant way." *Id.* at 444. Based on these facts the trial court properly found that petitioner was not in custody and properly admitted the statement in evidence despite the absence of the *Miranda* warnings.

This action by the trial court is fully supported both by the text of the *Miranda* decision and is not contrary to subsequent cases decided by the United States Supreme Court.

In *Miranda v. Arizona, supra*, the Court stated:

> "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

The facts of the cases cited by petitioner are in striking contrast to the facts in the present case. In *Orozco v. Texas*, 394 *U.S.* 324 (1969), the court held that police interrogation of the accused in his own bedroom was in-custody interrogation. Central to this holding, however, was the fact that:

> "[F]rom the moment he gave his name . . . petitioner was not free to go where he pleased, but was 'under arrest,' " *Id.* at 325.

Similarly, in *Mathis v. United States*, 391 *U.S.* 1 (1968), defendant's interrogation by a federal revenue agent while he was in the state prison for an unrelated crime was held to be